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**HOUSE BILL 2550**

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**State of Washington 66th Legislature 2020 Regular Session**

**By** Representatives Lekanoff, Fitzgibbon, Doglio, Peterson, Pollet, and Macri

AN ACT Relating to establishing net ecological gain as a policy for application across identified land use, development, and environmental laws; amending RCW 90.74.020 and 90.74.040; reenacting and amending RCW 90.74.010; adding a new chapter to Title 70 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Mitigation" means the restoration, creation, enhancement, or preservation of ecosystems, habitats, or natural resources for the purposes of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved. "Mitigation" includes mitigation that:

(a) Occurs at the same time as, or in advance of, a project's environmental impacts;

(b) Is located either on-site of the project's impacts or within an appropriate geographic scale defined by the department of ecology to ensure ecological health of the same watershed; and

(c) Provides the same in-kind biological functions and values as the functions and values impacted by the project.

(2)(a) "Mitigation hierarchy" means a management system to address environmental impacts through mitigation that is prioritized in descending order as follows:

(i) Avoidance: Measures taken to avoid creating direct, indirect, or cumulative impacts from the outset of a development project, policy, plan, or activity;

(ii) Minimization: Measures taken to reduce any combination of the duration, intensity, or extent of direct, indirect, or cumulative impacts that cannot be completely avoided under (a)(i) of this subsection;

(iii) Rehabilitation or restoration: Measures taken to rehabilitate degraded ecosystems or restore impacted ecosystems following exposure to impacts that cannot be completely avoided under (a)(i) of this subsection or minimized under (a)(ii) of this subsection;

(iv) Offset: Measures taken to compensate for any residual impacts that cannot be completely avoided, minimized, or rehabilitated or restored under (a)(i) through (iii) of this subsection including, but not limited to, measures that use positive management interventions such as restoration of degraded habitat, arrested degradation of habitat or ecosystems, or averted risks to habitat or ecosystems, and protection of areas where there is imminent or projected loss of ecological integrity;

(v) Compensation: Measures to recompense, make good, or pay damages for loss of ecological integrity caused by a project, policy, plan, or activity that falls short of achieving net ecological gain through measures implemented consistent with (a)(i) through (iv) of this subsection. Compensation may only occur if net ecological gain cannot be achieved by measures identified in (a)(i) through (iv) of this subsection.

(b) Before utilizing a lower level in the mitigation hierarchy, project proponents must demonstrate that it is not possible to mitigate environmental impacts through actions taken consistent with higher levels of the mitigation hierarchy.

(3) "Net ecological gain" means a standard for a development project, policy, plan, or activity in which the impacts on the ecological integrity caused by the development are outweighed by measures taken consistent with the mitigation hierarchy to avoid and minimize the impacts, undertake site restoration, and compensate for any remaining impacts in an amount sufficient for the gain to exceed the loss.

NEW SECTION. **Sec.**  (1) It is the policy of the state that environmental, land use, and development laws in chapters 90.58, 36.70A, 77.55, and 70.105D RCW result in the achievement of net ecological gain, except where otherwise specified in statute.

(2) Where state agencies with rule-making authority derived from environmental, land use, and development laws have discretion under existing statutory authority to establish a standard of ecological or habitat protections or are not otherwise bound to a different standard of ecological protectiveness, those agencies must adopt rules to establish and implement a standard of net ecological gain.

NEW SECTION. **Sec.**  (1) By December 1, 2020, and consistent with RCW 43.01.036, the office of financial management must submit a report to the legislature that assesses how to incorporate net ecological gain and the mitigation hierarchy into state land use, development, and environmental laws and rules. The report must address each environmental, development, or land use law or rule where the existing standard is less protective of ecological integrity than the standard of net ecological gain and must include the following laws and rules adopted under these laws:

(a) The shoreline management act, chapter 90.58 RCW;

(b) The growth management act, chapter 36.70A RCW;

(c) Construction projects in state waters regulated under chapter 77.55 RCW; and

(d) The model toxics control act, chapter 70.105D RCW.

(2) In developing the report under this section, the office of financial management must consult with the appropriate state agencies with subject matter expertise on environmental, land use, and development laws including, but not limited to, the department of ecology, the department of fish and wildlife, and the department of commerce.

(3) The report must include:

(a) An assessment of opportunities and challenges for local government implementation of a standard of net ecological gain under different environmental, development, and land use laws;

(b) Recommendations on funding, incentives, technical assistance, monitoring, and other use of scientific data, and other applicable considerations to the integration of net ecological gain into each environmental, development, and land use law or rule;

(c) Recommendations regarding instances in which net ecological gain can be achieved using voluntary or incentive-based program structures and where net ecological gain is likely only to be achieved through regulatory requirements; and

(d) Assessments of how applying a standard of net ecological gain in the context of each environmental, land use, or development law is likely to achieve substantial environmental or social cobenefits.

(4) The definitions in section 1 of this act apply throughout this section unless the context clearly requires otherwise.

**Sec.**  RCW 90.74.010 and 2012 c 62 s 3 are each reenacted and amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Compensatory mitigation" means the restoration, creation, enhancement, or preservation of uplands, wetlands, or other aquatic resources for the purposes of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved. "Compensatory mitigation" includes mitigation that:

(a) Occurs at the same time as, or in advance of, a project's planned environmental impacts;

(b) Is located in a site either on, near, or distant from the project's impacts; and

(c) Provides either the same or different biological functions and values as the functions and values impacted by the project.

(2) "Family forest fish passage program" means the program administered by the recreation and conservation office created pursuant to RCW 76.09.410 that provides public cost assistance to small forestland owners associated with the road maintenance and abandonment processes.

(3) "Forestry riparian easement program" means the program established in RCW 76.13.120.

(4) "Infrastructure development" means an action that is critical for the maintenance or expansion of an existing infrastructure feature such as a highway, rail line, airport, marine terminal, utility corridor, harbor area, or hydroelectric facility and is consistent with an approved land use planning process, or that is an activity regulated under chapter 76.09 RCW. This planning process may include the growth management act, chapter 36.70A RCW, or the shoreline management act, chapter 90.58 RCW, in areas covered by those chapters.

(5) "Mitigation" means sequentially avoiding impacts, minimizing impacts, or compensating for remaining unavoidable impacts.

(6) "Mitigation plan" means a document or set of documents developed through joint discussions between a project proponent and environmental regulatory agencies that describe the unavoidable wetland or aquatic resource impacts of a proposed infrastructure development ((~~or noninfrastructure development~~)) and the proposed compensatory mitigation for those impacts.

(7) ((~~"Noninfrastructure development" means a development project that requires the completion of compensatory mitigation that does not meet the definition of "infrastructure development" and is consistent with an approved land use planning process. This planning process may include the growth management act, chapter 36.70A RCW, or the shoreline management act, chapter 90.58 RCW, in areas covered by those chapters.~~

~~(8)~~)) "Project proponent" means a public or private entity responsible for preparing a mitigation plan.

((~~(9)~~)) (8) "Riparian open space program" means the program created pursuant to RCW 76.09.040.

((~~(10)~~)) (9) "Watershed" means an area identified as a state of Washington water resource inventory area under WAC 173-500-040 as it exists on June 7, 2012.

**Sec.**  RCW 90.74.020 and 2012 c 62 s 4 are each amended to read as follows:

(1) Project proponents may use a mitigation plan to propose compensatory mitigation within a watershed. A mitigation plan shall:

(a) Contain provisions that guarantee the long-term viability of the created, restored, enhanced, or preserved habitat, including assurances for protecting any essential biological functions and values defined in the mitigation plan;

(b) Contain provisions for long-term monitoring of any created, restored, or enhanced mitigation site; and

(c) Be consistent with the local comprehensive land use plan and any other applicable planning process in effect for the development area, such as an adopted subbasin or watershed plan.

(2)(a) ((~~The~~)) When considering infrastructure development, the departments of ecology and fish and wildlife may not limit the scope of options in a mitigation plan to areas on or near the project site, or to habitat types of the same type as contained on the project site. The departments of ecology and fish and wildlife shall fully review and give due consideration to compensatory mitigation proposals that improve the overall biological functions and values of the watershed or bay and accommodate the mitigation needs of the infrastructure development ((~~or noninfrastructure development~~)), including proposals or portions of proposals that are explored or developed in RCW 90.74.040.

(b) The departments of ecology and fish and wildlife are not required to grant approval to a mitigation plan that the departments find does not provide equal or better biological functions and values within the watershed or bay.

(3) When making a permit or other regulatory decision for infrastructure projects under the guidance of this chapter, the departments of ecology and fish and wildlife shall consider whether the mitigation plan provides equal or better biological functions and values, compared to the existing conditions, for the target resources or species identified in the mitigation plan. This consideration shall be based upon the following factors:

(a) The relative value of the mitigation for the target resources, in terms of the quality and quantity of biological functions and values provided;

(b) The compatibility of the proposal with the intent of broader resource management and habitat management objectives and plans, such as existing resource management plans, watershed plans, critical areas ordinances, the forestry riparian easement program, the riparian open space program, the family forest fish passage program, and shoreline master programs;

(c) The ability of the mitigation to address scarce functions or values within a watershed;

(d) The benefits of the proposal to broader watershed landscape, including the benefits of connecting various habitat units or providing population-limiting habitats or functions for target species;

(e) The benefits of early implementation of habitat mitigation for projects that provide compensatory mitigation in advance of the project's planned impacts; and

(f) The significance of any negative impacts to nontarget species or resources.

(4) A mitigation plan ((~~may~~)) must be approved through a memorandum of agreement between the project proponent and either the department of ecology or the department of fish and wildlife, or both.

**Sec.**  RCW 90.74.040 and 2012 c 62 s 5 are each amended to read as follows:

(1)(a) To the degree that resources are deemed available by the affected departments, the department of ecology and the department of fish and wildlife shall allow, when appropriate, programs that are related to environmental mitigation, or explore the potential of developing new programs, to utilize the forestry riparian easement program, the riparian open space program, or the family forest fish passage program to mitigate for environmental impacts from projects conducted in the state where compatible with existing regulations. The use of these programs may not be additive to existing compensatory mitigation requirements.

(b) In implementing this subsection, the department of natural resources may be used as a resource, consistent with RCW 76.09.480, to assist in identifying potential projects that can be used for the mitigation of infrastructure ((~~and noninfrastructure~~)) development.

(2) The department of ecology and the department of fish and wildlife are authorized to seek federal or private funds and in-kind contributions to implement this section. The scope of effort in implementing this section may be defined by the success of the department of ecology and the department of fish and wildlife in securing specific funding.

NEW SECTION. **Sec.**  Sections 1 and 2 of this act constitute a new chapter in Title 70 RCW.

**--- END ---**